

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STATE OF WASHINGTON,

Plaintiff,

V.

THE GEO GROUP, INC., a Florida
corporation,

Defendant.

Case No. 17-cv-05806-RJB

UGOCHUKWU GOODLUCK
NWAUZOR on behalf of all those
similarly situated, and FERNANDO
AGUIRRE-URBINA, individually,

Plaintiffs,

V.

THE GEO GROUP, INC., a Florida
corporation,

Defendant.

Case No. 17-cv-05769-RJB

PLAINTIFFS' MOTION FOR
RECONSIDERATION OF
COURT'S ORDER ON
MOTIONS *IN LIMINE*

NOTE ON MOTION
CALENDAR: OCTOBER 8, 2021

I. INTRODUCTION & BACKGROUND

Pursuant to W.D. Wash. LCR 7(h), Plaintiffs move for reconsideration of the Court's Order on Motions In Limine regarding the exclusion of ICE Acting Director Tae Johnson. Dkt. 458 (Order) at 2. This motion is proper in so far as it follows within 14 days of the underlying

1 order and is based on new facts that could not have been brought to the Court's attention
2 sooner. *See* LCR 7(h)(1) and (2).

3 When Plaintiffs filed their motion in limine to exclude Johnson, GEO's *Touhy* request
4 seeking his trial testimony was still pending. *See* Dkt. 433 (Nwauzor Mot. in Limine). ICE
5 declined to produce Johnson for trial. *See* Dkt. Ex. 439 (Suppl. Auth.). However, just
6 yesterday, we learned that ICE authorized in his stead the testimony of Monica Burke, Acting
7 Assistant Director for the Custody Management Division of Enforcement and Removal
8 Operations of the Immigration and Customs Enforcement agency. *See* Declaration of Jamal
9 Whitehead in Support of Plaintiffs' Motion for Reconsideration, Ex. A.

10 II. ARGUMENT

11 The Court should exclude Ms. Burke's testimony because GEO never identified her in
12 its initial disclosures, discovery responses, nor as a witness for the first trial. *See* Fed. R. Civ.
13 P. 37(c)(1) ("If a party fails to ... identify a witness as required by Rule 26(a) or (e), the party
14 is not allowed to use that ... witness to supply evidence ... at a trial, unless the failure was
15 substantially justified"). The Court has granted motions in limine striking previously
16 undisclosed witnesses on at least two prior occasions and should do so here as well. Dkt. 287
17 (Apr. 16, 2020, Hr'g Tr.) at 13:1 and Dkt. 458 (Order) at 4.

18 Setting aside GEO's failure to identify Ms. Burke as a witness at any point in this case,
19 there are other grounds on which to exclude her testimony. First, her testimony is largely
20 irrelevant and poses a significant risk of confusion and prejudice. Fed. R. Evid. 401-403. For
21 example, one of the topics on which Ms. Burke is authorized to testify is "the \$1 allowance,
22 where it is derived, and whether detainees are paid \$1 per day at ICE-owned detention facilities
23 for participation in the VWP." Ex. A at 3. But as this Court has already recognized, any

1 testimony regarding the pay rate for detainee workers at ICE-owned facilities in other states is
2 irrelevant to whether the detainee workers at the NWDC are “employees” under Washington’s
3 Minimum Wage Act. Dkt. 458 (“[T]estimony about what GEO pays detainees under a
4 Voluntary Work Program in other jurisdictions is likely not relevant.”). Similarly, the origin
5 of the \$1 reimbursement allowance is irrelevant to the determination of employee status and
6 will only serve to confuse and potentially mislead the jury. This is particularly true here, as the
7 Court has already ruled, and GEO has already admitted, that ICE in no way limits GEO’s
8 ability to pay detainee workers more than \$1/day. See Dkt. 287 at 9:21, Trial Ex. 609 at ¶15.
9 Likewise, Burke’s testimony may cause jurors to believe—*wrongly*—that ICE and its practices
10 somehow negate the application of the MWA to GEO or excuse its behavior. But the Court
11 long ago rejected GEO’s preemption arguments, and GEO should not be allowed to resurrect
12 them here through the testimony of Ms. Burke.

13 Second, ICE placed limits Ms. Burke’s testimony that would hinder Plaintiffs’ ability
14 to thoroughly and effectively cross-examine her should she testify, leading to further jury
15 confusion and prejudice to Plaintiffs. For example, Ms. Burke is specifically precluded from
16 testifying regarding “ICE and/or her opinions, legal conclusions, understanding, and/or views
17 regarding the VWP, appropriations, payment of \$1 per day, [or] PBNDS....” Ex. A at 4.
18 However, ICE indicates it will allow her testimony regarding such authorized topics as: “the
19 \$1 allowance, where it is derived, and whether detainees are paid \$1 per day at ICE-owned
20 detention facilities for participation in the VWP”; “ICE’s role, if any, in the monetary
21 allowance provided to detainees for participating in the VWP at the NWDC”; and “the purpose
22 behind the VWP as it pertains to detainees from 2014 to the present.” Ex. A at 3. The
23

1 “authorized” questions necessarily implicate the legal conclusions, understanding and/or views
2 of Ms. Burke and her agency on these topics.

3 This creates a real risk that Ms. Burke would provide testimony regarding these topics
4 on direct examination by GEO, but then demur on cross-examination that she is not authorized
5 to provide testimony because the questions call for legal conclusions, understanding, and/or
6 views. For example, it is foreseeable, in light of Dan Ragsdale’s testimony at the first trial, that
7 GEO will try and solicit testimony from Burke that the \$1 rate stems from Congressional
8 legislation dating back to 1979. However, Ms. Burke might then refuse to answer Plaintiffs’
9 questions on cross examination regarding the absence of Congressional authorizations since
10 that date on the grounds that they involve her or ICE’s legal conclusions, understandings,
11 and/or views. This silence on critical issues on cross examination could leave the jury with the
12 misleading, prejudicial, and incorrect understanding that Ms. Burke agrees with Mr.
13 Ragsdale’s testimony, that the \$1 rate has been set by Congress and thus permits GEO’s actions
14 in this case. Such one-sided testimony is anathema to a fair trial and can only be prevented by
15 excluding the witness from testifying at all.

16 Finally, Plaintiffs requested leave to depose Mr. Johnson, and now Ms. Burke, as
17 alternative relief to excluding their testimony, but so far, ICE has denied Plaintiff’s *Touhy*
18 request for a deposition. It would be inequitable to allow GEO to call Ms. Burke as a trial
19 witness without affording Plaintiffs an opportunity to depose her and learn what she might say
20 first. This Court is vested with the sound discretion to control the proceedings, and allowing
21 GEO to call Ms. Burke without notice, or deposition, is to cede control of the order of
22 examination and the discovery process to ICE by administrative fiat.

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III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order precluding the trial testimony of Monica Burke.

DATED this 8th day of October, 2021.

SCHROETER GOLDMARK & BENDER

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DATED at Seattle, Washington this 8th day of October, 2021

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